IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 24023-1-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
COLT ALLEN O'CONNELL,	)	
	)	**UNPUBLISHED OPINION**
Appellant.	)	
	)	

SWEENEY, C.J.—A jury found Colt Allen O'Connell guilty of first degree kidnapping and first degree assault, based in large part on the testimony of the victim and an accomplice. Here on appeal he essentially challenges the credibility of the State's witnesses. And he challenges the propriety of a standard range sentence. Neither challenge is the proper subject of appellate review. And so we affirm both the judgment and sentence.

FACTS

Someone stole Mr. O'Connell's motorcycle. Mr. O'Connell received information that led him to Terry Lee Couveau.

Mr. O'Connell and three other men approached Mr. Couveau in the parking lot of a Spokane tavern. They forced him into a car at gun point, bound him with duct tape, and hit him in the face. They took him to a warehouse or garage and stripped off his clothes. Mr. O'Connell demanded information about his bike. Mr. O'Connell tied Mr. Couveau with an electrical cord and strung him from the rafters. He repeatedly hit Mr. Couveau and cut off his hair. Brian Thew, Mr. O'Connell's driver during this crime, faced the same charges. He corroborated the main points of Mr. Couveau's testimony and testified that Mr. O'Connell hit Mr. Couveau hard enough to make him scream in agony.

Mr. Couveau told Mr. O'Connell the bike might be at a certain house. The kidnappers drove there, found nothing, and took Mr. Couveau back to Sprague Avenue. He ran to a nearby gas station and asked for help. An employee described Mr. Couveau's bloody and bruised appearance. He was in a lot of pain and wearing only his pants and shoes. A friend took him to the emergency room. Mr. Couveau told the hospital staff that a transmission had fallen on him. He was hospitalized for several days.

A surgeon testified that Mr. Couveau suffered blunt trauma to his upper abdomen and a laceration of his spleen that was graded three on a four-point scale. The doctor explained that the spleen is highly vascularized and bleeds a lot. A person might easily bleed to death without medical intervention. Mr. Couveau's spleen injury stopped

bleeding by itself. And the treatment was, therefore, to keep him immobile and watch him. The doctor said Mr. Couveau "probably would have survived" without treatment. Report of Proceedings (RP) at 310. Nevertheless, it was a significant splenic injury.

Mr. O'Connell met with Stephen Miller after leaving Mr. Couveau. Mr. Miller testified that Mr. O'Connell forced him into a car and drove him to various locations while terrorizing him. Mr. Thew's testimony did not fully corroborate Mr. Miller's. For example, Mr. Thew said that Mr. Miller went with them voluntarily. Mr. O'Connell briefly left the car, and Mr. Miller got out and ran.

The State charged Mr. O'Connell with the first degree kidnapping, first degree robbery, and first degree assault of Mr. Couveau. The State also filed kidnapping and robbery charges involving Mr. Miller. The jury acquitted Mr. O'Connell on the counts involving Mr. Miller. But it found him guilty of the first degree kidnapping and first degree assault of Mr. Couveau.

The prosecutor requested the high end of the standard ranges—68 months for the kidnapping and 136 months for the assault. The prosecutor argued these were brutal crimes against two victims. He discussed the two victims in detail, expounding on their courage in cooperating with the prosecution, how Mr. O'Connell had tracked down, brutalized, and tortured two people, and caused them lasting emotional injuries. In

addition, a victim advocate discussed Mr. Miller as a victim, describing his nightmares and fear for his family. The advocate also asked for the high end. The court said these statements were "well taken." RP at 614.

The court imposed the middle of the standard range on both counts, 60 months for the kidnapping and 110 months for the assault.

DISCUSSION

Mr. O'Connell challenges the credibility of Mr. Couveau and Mr. Thew. He also challenges the sufficiency of the evidence that Mr. Couveau suffered great bodily harm. Finally, he contends the irregularities at the sentencing hearing require remand.

Mr. O'Connell first contends that the State's evidence was insufficient to support the verdict. He argues that Mr. Couveau's testimony was different from the story he told emergency personnel at the time. Moreover, the jury obviously did not believe all of Mr. Couveau's testimony, because it did not convict Mr. O'Connell of all of the charges. Also, the charges facing Mr. Thew gave him an obvious incentive to lie. And Mr. Thew's testimony was not entirely consistent with Mr. Couveau's. Therefore, Mr. O'Connell contends, no reasonable jury could have found him guilty beyond a reasonable doubt.

A challenge to the sufficiency of the evidence requires that we view the trial

record in the light most favorable to the State and ask whether any rational trier of fact could have found the essential elements of the charged crimes beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). A sufficiency challenge admits the truth of the State's evidence and all inferences that reasonably can be drawn from it. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). We do not review the jury's deliberations on questions of conflicting testimony, witness credibility, or the persuasiveness of the evidence. *State v. Randecker*, 79 Wn.2d 512, 517-18, 487 P.2d 1295 (1971).

The State presented evidence here from which this jury could reasonably have found all the necessary elements if it believed the witnesses. The jury was aware of the different accounts given by Mr. Couveau. Defense counsel developed all inconsistencies. The jury knew that Mr. Couveau had a criminal record for crimes of dishonesty, including theft. It was told it could consider this in evaluating his credibility. Clerk's Papers at 45. The jury also knew the nature of Mr. Thew's involvement. And the court instructed it to act upon an accomplice's evidence with caution.

The jury resolved conflicts in the testimony, determined witness credibility, and evaluated the weight to be given to the evidence. Even if we were inclined to disagree, and we are not, we would not substitute our opinion for that of the jury.

Mr. O'Connell also contends that all the evidence in a criminal case must be consistent with guilt. He is mistaken. Conflicts in the evidence are the rule. Resolving them is the role of the jury. *Randecker*, 79 Wn.2d at 517-18. Direct and circumstantial evidence are subject to the same standard. *State v. Rangel-Reyes*, 119 Wn. App. 494, 499, 81 P.3d 157 (2003).

Mr. O'Connell next contends that the State did not prove that Mr. Couveau suffered great bodily harm. He argues that great bodily harm means "bodily injury that creates a probability of death." Appellant's Br. at 22. Mr. Couveau's most serious injury was a lacerated spleen which did not even require surgery. The doctor testified that, while a spleen injury might be fatal, Mr. Couveau also might have survived with no treatment. Mr. O'Connell contends that the possibility of death is not the same as the probability of death.

Again, accepting the State's evidence as true, we must conclude that great bodily harm was proven. The surgeon testified—and defense counsel argued in closing—that Mr. Couveau's life was not in danger because he came to the hospital and was kept in bed. But the jury could reasonably infer that Mr. Couveau probably would have died without bed rest to keep him from moving around.

Mr. O'Connell asks us to review his standard range sentence. He contends that the

sentencing court considered crimes against a nonexistent second victim in the person of Mr. Miller, which violated his constitutional right to a jury and subjected him to double jeopardy. The State does not defend the propriety of the references to Mr. Miller. The State contends, however, that a sentencing court may rely on any facts to which no objection is raised. RCW 9.94A.530(2). Here, the defense did not object. Also, the record does not suggest that the judge was influenced.

A standard range sentence is not generally appealable. We may review a standard range sentence, however, if the sentencing court exceeded its authority by deviating from either statutory procedure or constitutional limits. RCW 9.94A.585 (former RCW 9.94A.210(1)); *State v. Osman*, 126 Wn. App. 575, 579, 108 P.3d 1287, *review granted*, 155 Wn.2d 1021 (2005); *State v. Mail*, 121 Wn.2d 707, 711-13, 854 P.2d 1042 (1993). Whether a standard range sentence exceeds the authority of the trial court presents questions of statutory interpretation and constitutional analysis. Our review is, therefore, de novo. *See, e.g.*, *State v. Herzog*, 112 Wn.2d 419, 423-32, 771 P.2d 739 (1989).

Here, Mr. O'Connell is challenging the sentencing court's allowing the prosecutor and a victim advocate to argue for a high end standard range sentence based on facts not found by a jury.

First, contrary to his suggestion, the court did not run Mr. O'Connell's sentences

consecutively because of improper influence. These are serious violent offenses and the sentences must run consecutively. RCW 9.94A.589(1)(b).

Certainly, a sentencing court may not consider "material facts of constitutional magnitude that are not true." *Herzog*, 112 Wn.2d at 431. We presume, as we must, however, that a judge considers evidence only for its proper purpose. *State v. Bell*, 59 Wn.2d 338, 360, 368 P.2d 177 (1962); *State v. Maesse*, 29 Wn. App. 642, 649, 629 P.2d 1349 (1981).

Sentencing courts have wide discretion over the "sources and types" of information they consider in determining the length of a sentence within the standard range. *Herzog*, 112 Wn.2d at 424. To balance this discretion, the SRA[1] allows a defendant to dispute facts presented at sentencing. RCW 9.94A.530(2). If the defendant does dispute a fact, the court must either hold an evidentiary hearing or disregard that fact. *Id.* The court may rely on facts that are not disputed, however, unless the error "invades a fundamental right" of the accused. *Id.*; *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997) (jury instructions).

That is not what happened here. There is no fundamental right to a jury determination of facts the court considers in exercising its broad discretion when

[1] Sentencing Reform Act of 1981, ch. 9.94A RCW.

sentencing within a standard range. *United States v. Booker*, 543 U.S. 220, 233, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005). A sentencing factor enhances the sentence only if it increases the standard range. *State v. Kinney*, 125 Wn. App. 778, 782-83, 106 P.3d 274 (2005), *review denied*, 156 Wn.2d 1010 (2006). The court may sentence *within the standard range* based on accusations for which the defendant was neither tried nor convicted without violating the constitution. *Herzog*, 112 Wn.2d at 425.

The error would be reviewable if the court had increased the standard sentencing range based on unproved or unadmitted facts. *Blakely v. Washington*, 542 U.S. 296, 301-02, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). If a timely and specific objection is not made, however, the information is deemed admitted. *Mail*, 121 Wn.2d at 712. Moreover, the argument did not increase the standard range or otherwise affect the maximum sentence. Mr. O'Connell received the middle of the standard range for two crimes against one victim—Mr. Couveau.

We will not address the argument that the sentence might have been lower in standard range if only the judge had been mindful of the specifics of the case. That must be argued to the sentencing court. *Booker*, 543 U.S. at 241 n.5 (citing *Edwards v. United States,* 523 U.S. 511, 515-16, 118 S. Ct. 1475, 140 L. Ed. 2d 703 (1998) (defendant was convicted of a cocaine-only—not a cocaine-and-crack—conspiracy)).

Moreover, the record does not suggest that this judge was influenced by improper considerations. The court simply listened to everybody and then imposed a middle-of-the-range sentence based on its own view of the case. The court rejected the high end sentence requested by the State and the victim advocate. Instead of 68 and 136 months, the court imposed 60 months for the kidnapping and 110 for the assault. The judge also considered the low end of the range, but rejected it based on facts proved to the jury: "I think the low end is – is inappropriate under these circumstances. I don't think I can give a low range sentence to somebody that – that did the kind of acts that I . . . believe Mr. O'Connell did *and that the jury found that he did.*" RP at 614 (emphasis added). The judge's comments on the record show that he chose the sentence thoughtfully.

We affirm the judgment and sentence.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Sweeney, C.J.

WE CONCUR:

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Brown, J.

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Kulik, J.